United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7461

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSE FERNANDEZ,

Plaintiff,

—against—

CHIOS SHIPPING CO., LTD.,

Defendant and Third-Party Plaintiff-Appellee,

—against—

MAHER STEVEDORING COMPANY, INC., and STATES MARINE LINES, INC.,

Third-Party Defendants-Appellants.

CHIOS SHIPPING CO., LTD.,

Fourth-Party Plaintiff-Appellee,

—against—

CASTLE & COOKE, INC., DOLE CORP. and CASTLE & COOKE FOODS CORP.,

Fourth-Party Defendants-Appellants.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS CASTLE & COOKE, INC., DOLE CORP. AND CASTLE & COOKE FOODS CORPORATION (DOLE GROUP)

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Preliminary Statement

The name of the Judge who rendered the decision and judgment appealed from is Constance B. Motley.

Statement of the Case

On August 10, 1972 the plaintiff Jose Fernandez, served a complaint upon Chios Shipping Company, Ltd., (Chios), to recover damages for personal injury.

The plaintiff alleged in his complaint that on September 1, 1968, while employed as a longshoreman by third party defendant Maher Stevedoring Co., Inc., (Maher), he was injured by falling cargo, due to the negligence and unseaworthiness of the Shipowner Chios, while its vessel was moored at Berth 16, Port Newark, State of New Jersey.

An answer was filed by defendant Chios in which the material allegation of the plaintiff's complaint were denied.

The defendant Chios served a third party complaint against the plaintiff's employer, Maher, claiming indemnity against Maher on the theory of the Stevedore's implied warranty of workmanlike performance.

Defendant Chios served a third party complaint against States Marine Lines Inc., (States), the time charterer of the M/V Chios, by reason of the negligence and breach of warranty of the charter party.

On August 16, 1974, more than six years after the date of plaintiff's injuries, the defendant Chios served a fourth party complaint against Castle & Cook Foods Corporation (Castle-Cook and Dole Group) claiming indemnity against Dole due to a) breach of warranty, b) neg-

ligence, c) defective nature of re-palletized cartons and d) breach of contractual undertaking.

The fourth party answer of Castle-Cook and Dole denied the allegations of the fourth party complaint and served a counterclaim against Chios and cross-claims for indemnity against Maher and States.

All other third party defendants served cross-claims.

The issues in the action were brought on for trial before the court and jury, and the jury found in reply to special questions that the vessel was unseaworthy, the plaintiff was free of contributory negligence and the plaintiff entitled to recover $90,200 from the vessel Chios.

In response to special questions the jury found the vessel owner Chios was entitled to indemnity from Maher and Castle-Cook and Dole Group.

In a memorandum opinion, dated January 15, 1976, Judge Motley held that the ship owner Chios was entitled to indemnity from the charterer, States and also found that charterer, States was entitled to indemnity from both Maher and Castle-Cook and Dole Group.

On January 19, 1976, the fourth party defendant Castle-Cook and Dole Group filed its appeal.

In April, 1976, the judgment of the plaintiff against the defendant Chios was discharged for $75,000, by the defendant shipowner Chios.

Statement of Facts

The Accident:

There were two inconsistent versions of this accident:

According to one witness, Cipriano Romero (40a), while working in the lower hold (48a), a pallet containing car-

tons of pineapples (55a), was placed on the square by a hi-lo (68a), hooked up with a bridle (55a), picked up by the cargo winches, swung out, and raised up (74a), about ten feet high (75a), when the pallet broke (76a), and a carton hit the plaintiff.

On the particular draft involving this accident, there was very little room (90a), and the forklift man didn't have much room to do his job (91a). This load had been laid down near the edge of the opening (91a, 92a).

Another eye witness, Alonzo Perry (114a), was operating a hi-lo (117a), and not too much cargo had been taken out of the hatch (119a). At the time of the accident, he was inexperienced (128a). He had raised the pallet on his blades and started to back up (139a). The pallet was about half way clear of the next pallet below when the accident occurred (139a).

The plaintiff testified that his job was to hook angle rims to the pallet (54a). On this particular draft there was very little room (90a), and the forklift man had very little room to do his job (91a). There was no place to stand clear; there was no place at all (299a).

The Palletized Loads:

At the time of the accident, cartons of pineapples placed on pallets were being discharged in New Jersey. These pallets were made of Philippine hardword (39a-7) and made in accordance with specifications of the National Wooden Pallet Manufacturers Association (39a-7). There were 753 pallets and the product weight of each pallet varied (39a-4).

Peter Lantelme, a witness employed by third party defendant States Marine Lines, as a cargo claims manager (194a) testified that States Marine had been carry-

ing these prepalletized cartons for 20 years (222a) prior to 1968 (218a), and such was the standard practice (229a). Mr. Lantelme, in twelve years of claims (413a), had *never* seen a claim where a pallet broke (413a).

The Plaintiff's Injuries:

An eyewitness to the accident, Alonjo Perry, testified that plaintiff "was not knocked out." Chios Exhibit B.

A report of plaintiff's employer, stated the plaintiff received a "laceration of the scalp." Chios Exhibit M.

The hospital emergency room record states "no apparent loss of consciousness", "laceration of scalp—3 stitches , "no evidence of fracture . . . no evidence of increased intracranial pressure". Plaintiff's Exhibit 4.

Four days later, plaintiff admitted himself to St. James Hospital, claiming he passed out on the street. He had high blood pressure, which had been unstable before this accident. On admission, his physical exam was unremarkable. On discharge the diagnosis was "post traumatic cranial syndrome."

At the time of trial, the plaintiff had not been treated by any doctor, nor did he take medication for his injury for a period of five years and eight months.

After returning to work, the plaintiff was worked *continuously* as a hi-lo operator to the date of trial. A hi-lo is a machine which carries cargo from place to place on a fork attached to the front. It has a short turning radius and in maneuvering it the plaintiff must back up and through narrow corridors and look where he is going, from right to left, up and down, the hi-lo has no rear mirror.

POINT I

Should the verdict of the jury in favor of the shipowner Chios against the shipper Dole Group have been set aside and fourth party complaint dismissed since there was no evidence that the shipper Dole Group was negligent.

The fourth party complaint by Chios against the shipper Dole Group should have been dismissed by the trial court since there was no evidence of negligence in the record, no evidence that any latent defect existed, and no proof of any causal connection between condition of the pallet and the plaintiff's injuries.

It is well settled, that a shipowner is not entitled to indemnity from a shipper where the testimony is insufficient to show negligence. *Williamson* v. *Compania,* 446 F. 2d 1339.

Since the case against the shipper rested on the theory of negligence in the process of manufacture, the shipowner was required to prove a breach of duty on the part of the shipper toward the shipowner.

The mere fact that a person has suffered injuries from the use of the article manufactured does not establish negligence on the part of the manufacturer or shipper. *Kramer* v. *Mills Lumber Co.,* 24 F. 2d 313.

On no ground may there be a recovery from a manufacturer alleged to have caused injury unless the product is shown to have been defective in some way and that the manufacturer's act or omission with respect to the product is shown to be causally related to the harm. *Nicklaus* v. *Hughes Tool Co.,* 417 F. 2d 983 (1969).

The necessity of proving defectiveness applies no matter what theory governs the particular action.

In the case at bar, there is no evidence that the pallet was ever found defective.

The uncontroverted testimony is such that these pallets were so used and manufactured for twenty years; that they were made according to specifications from Mahogany, a known hardwood. This pallet was one of 723 pallets, made in the same manner and of identical material, and no other pallet broke.

A witness for the defendant Maher, the Stevedore employer, testified that in twelve years of handling damage claims, he never heard of a pallet breaking. No evidence of any prior accidents were ever inferred. There was no evidence of any prior complaints.

The shipowners failure to adduce any evidence of prior injuries arising out of the use of these pallets is a sound reason for granting dismissal of the instant third party claim.

No tests of the alleged defective product were conducted.

There is no testimony that the materials used nor the specifications followed would produce a defective product.

No expert testimony established any failure to meet proper standards of safety. In fact, the "expert" had no opinion as to what actually caused the accident at all.

POINT II

The trial court should have rejected the opinion testimony of Mr. Devaney on behalf of the shipowner Chios, on the grounds that he was unqualified, his testimony inadmissible, and lacked probative value.

The testimony of Mr. Devaney, submitted as an expert witness of shipowner Chios, bordered on the absurd and failed to provide any probative value.

The trial court abused its discretion in ruling that this witness qualified as an expert. Mr. Devaney was unqualified since he did not comply with the subject matter test of Rule 702. Where the ruling of the trial court is manifestly erroneous, its action should be overruled. *Salem* v. *United States Lines,* 370 U.S. 31 (1962).

While the witness Devaney had some carpentry experience (337a), he could not identify a wood sample as being Mahogany or any other type of wood (358a). He had actually *refused* to examine a similar pallet prior to trial (388a). His experience was limited to Stevedore pallets (342a), which was not the type pallet of this action. Mr. Devaney had never examined a Dole pallet, neither the one involved in this accident nor any similar pallet (344a, 345a). There was no basis for comparison of a Dole pallet and a Stevedore pallet (351a). This witness was so inadequately qualified to be an expert is better illustrated by his statement that he purchased Philippine Mahogany from the Japanese in World War II and then sold it to the United States Government (353a). Therefore, since this witness could not meet the subject matter test of Rule 702, he was unqualified.

Moreover, the testimony of Mr. Devaney lacked any probative value and should have been stricken. The mandate of Rule 703 requires that an expert have *some* basis

for his opinion. Where he has *no* basis, he has no opinion.

Where a proposed expert witness has *no* basis for his opinion, then his testimony has no prabative value and should be striken.

In the instant case, Mr. Devaney had no first hand observation of the pallet which allegedly broke. No prior witness testified as to the condition of this pallet before or after the accident. The record is barren of any defect in the pallet, whether latent or patent.

Mr. Devaney actually refused to examine a similar pallet prior to trial (388a).

He was first called to handle this case two months prior to trial, by a telephone call from the attorney for defendant Chios (384a).

No papers were given him concerning the materials used in the Dole pallet other than size dimensions (385a).

He never compared a Stevedore pallet with the Dole pallets for weight, materials and thickness.

He was not present during trial and did not hear any testimony of other witnesses.

No data was ever shown Mr. Devaney (451).

The hypothetical question given Mr. Devaney was inadequate since it provided only an average weight of a load which varied (39a-4). This question was patently defective to provide an opinion as to the cause of a pallet having broken. This question itself was deficient.

Part of the hypothetical question given to Mr. Devaney was unintelligible (358a, 363a).

No testimony in the record provides the *thickness* of the wood used in the Dole pallet (370a), a necessary sine-qua-

non for any witness to determine the load carrying quantities of the pallet material. This flaw was admitted by the attorney for Chios (371a).

At one point, the trial court itself said:

> "I don't know that there is sufficient in the record, then, for this witness to tell us what might have caused the pallet to break down." (373a)

In any event, the hypothesis given to this witness was fatally incomplete since it a) said nothing of the pallet materials, b) provided no information of the manner of construction, c) no information on loading or over-loading, d) no observation as to any defect, whether latent or patent and e) no information which would have excluded damage during the voyage.

In answer to the trial court's question on whether the witness had an opinion as to what might have caused this pallet to leak, the witness replied:

> "Your honor, it can't be answered yes or no." (378a)

In fact, the witness never gave any opinion concerning *this particular pallet.*

> "The opinion is this: that a fragile pallet of this type . . . I am talking about the custom, *I am not talking about this particular pallet,* I am just talking about the tend of the market . . . (379a)

This response is plainly insufficient as a matter of law.

The witness further testified that he had *no* opinion as to what actually caused this accident (393a). This answer excluded the witness from showing the necessary fact causation to a prima facie case.

The witness Devaney testified his opinion rested upon a *two*-phase answer (382a).

The first phase of his answer was dependent upon prior use of this particular pallet (377a-382a).

Since the witness was unable to answer phase-one of his answer, he was necessarily precluded from an answer to phase-two.

The second phrase of the answer was "could be faulty materials", is of itself insufficient since no foundation existed for the witness to give such a response. This witness never observed the materials and the hypothetical question did not provide that information. This response should have been stricken.

Since the defendant Chios relies on a *latent* defect to prove its case, there should be *some* testimony that such an alleged defect existed. The record is again barren on this aspect.

The witness Devaney was *never asked* whether a latent or patent defect existed.

Therefore, there was insufficient evidence to show any negligence by the shipper Dole Group.

POINT III

Did the trial court commit reversible error when it failed to present all third party claims to the jury as it promised and when the trial court refused to receive exceptions to the trial court's charge.

The trial court agreed and all parties agreed that the issues of the negligence of the time charterer, States, would be given to the jury. Moreover, it was uncontroverted during trial that States had reimbursed Dole Group for damage to its merchandise (723).* The court agreed

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* Refers to pages of the original transcript.

this admission of fault was evidence that States was responsible for the discharge of particular cartons and that it was primarily responsible (723).* In conclusion the court agreed that the questions relating to the responsibility of the charterer and its possible fault would be given to the jury (728).* The record is replete that the court's agreement that the jurors would have to find whether the shipowner or the charterer knew about the conditions existing on the vessel (743).* The court promised to provide questions to the jury to decide the issues of the charterer's responsibility (750).*

As a result the charge given by the court to the jury raised questions of fact concerning the charterer's duties and responsibilities.

The summations of all the attorneys for the various parties were keyed to the duties including those of the time charterer.

However, when the questions had been given to the jury to review, there was no reference at all to the burdens of proof against the time charterer and whether these burdens had been sustained. It is obvious that this prejudicial error requires reversal itself. The mandate of Rule 51 was complied with in that the objections were sufficiently made for the court to review exceptions to the charge. However, the court refused to entertain exception until the jury had commenced its deliberation. Therefore, as a result of the deficiency in giving the case against the time charterer to the jury, the rights and responsibilities of the other parties were significantly prejudiced.

This fatal flaw in the case was not cured by the trial court's decision several months later (11a-31a) in which it assumed the task of becoming a trier of fact and sum-

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* Refers to pages of the original transcript.

marily deciding the case against the time charter and at the same time summarily deciding the question of fact as to what indemnity, if any, should be given to the time charterer. Therefore the significant errors by the trial court alone would constitute reversible error and require a new trial.

POINT IV

Did the trial court commit reversible error when it admitted surveys of independent contractors into evidence.

During the course of this trial the defendant Chios offered into evidence surveys taken by independent contractors during this voyage at different ports during this three month voyage.

These surveys were offered on the basis that they were made in the ordinary course of business of the defendant States Marine Lines (194a). A witness, Mr. Lantelme, had been subpeoned by the defendant Chios (194a). This witness testified that surveyors were hired to survey hatches before loading, continued to survey during loading and made comments subsequent to loading at each port of call (195a). Since these exhibits were offered as records kept in the ordinary course of business of States, but were actually prepared by independent contractors, the objection to their admissibility should have been sustained. These exhibits include Exhibit D, which was prepared by a company known as International Harvester MacLeod, Inc. Exhibit E was another survey made by the Taiwan Maritime Company in Taiwan and objection was made to the submission of this paper under the regular course of business rule (199a). The third exhibit was marked as Exhibit F and made by the Hong Kong Maritime Company, Limited, made in Hong Kong (200a).

Objection was made to the admission of this document made in Kobe, Japan by a company known as International Inspection and Testing Corporation. The witness also (200a). The fourth exhibit marked as Exhibit G was verified this last company as surveyors in Kobe that States "uses from time to time" (201a). These reports were used for the purpose of showing the conditions of various types of material stored on that ship.

Since the surveys were made by independent contractors, they should have been held inadmissible. Since the defendant Dole Group was unable to cross-examine anybody with knowledge of these surveys and since defendant Dole Group was unable to determine what damage, if any, was found in the ship's hold at the time of these surveys, then the admission of these documents constitutes reversible error.

It is plain that the defendant Chios relied on these documents to substantiate its claim. It was verified in these documents that the ship which transported these pallets for a three month period encountered heavy storms which damaged various parts of the ship and that the ship was also the victim of pilferage. This witness also verified that States Marine indemnified Dole for all damage done on this ship. As a result of the admission of these records, the defendant Dole was prejudiced, since it was unable to cross-examine any person with knowledge of these records.

There was no compliance with the admissibility requirements of Section 1732 relating to records made in the regular course of business as required by 28 U.S.C. 1732. It has been held that where the employee of owners of shipped fishmeal was not associated with the firm of cargo surveyors which inspected the fishmeal prior to its shipping and did not have personal knowledge of how the firm created or kept its records, the employee's testimony was

insufficient in action by fishmeal owners to recover from carrier for losses incurred to establish an adequate foundation for admission under business record exception to the hearsay rule. *J. Howard Smith, Inc.* v. *S.S. Moranore,* C.A.N.Y. (1974) 501 F 2d 1275, certiorari denied 95 S. Ct. 1399.

It has also been held that documents in file of *foreign corporations* were not admissible as business records where witness who produced them was not familiar with business practice. *U.S.* v. *Rosenstein,* C.A.N.Y., (1973), 474 F 2d 705.

Therefore, reversible error was created by the admission of these records.

POINT V

There was no basis in the record for the jury to decide the issue of latent defect.

The record is barren that any defect existed whether obvious or latent. No witness testified as to any observation made of this pallet at any time while it was in the possession of this shipowner. The proposed expert witness, Mr. Devaney, said he had no personal knowledge and was given no data that a latent defect existed.

In a question submitted to the jury, it was conceded that Chios relied upon a latent defect to prove its case. It is also incontroverted that no question was ever given to the proposed expert as to the obvious or latent nature of any proposed defect. Therefore, the case by Chios should have been dismissed on the grounds of insufficiency of proofs that any question of fact existed as to the existence of a latent defect.

The charge given to the jury was defective and erroneous.

The trial court should have dismissed the claim of Chios against Dole Group.

POINT VI

Was the verdict for the plaintiff in the sum of $90,200 excessive.

The judgment in favor of the plaintiff should be reversed because of the excessiveness of the judgment for $90,200.

Where, as here, the trial judge has denied a motion for a new trial on the grounds of excessiveness and permitted the verdict to stand, the Appellate Court may order a new trial where the verdict is irrational or so high as to shock the judicial conscience, rendering it an abuse of discretion not to set it aside. Here, we rely upon the Appellate Court's recent decision in *DeMauro* v. *Central Gulf S.S. Corp.* v. *International Terminal Operating Co. Inc.,* 514 F 2d 403 2d Cir. 1975.

In the instant case as in *DeMauro,* the jury's verdict was based substantially on damages for future loss of wages and future pain and suffering which is not justified by the testimony.

The record in the present case shows that the plaintiff sustained a laceration of the scalp which required three stitches. Three days later he admitted himself to the hospital claiming he had taken a fainting spell. At the time of his admission to the hospital he was suffering from high blood pressure, a condition for which he had been treated prior to the date of his accident.

During the time the plaintiff remained in the hospital he received conservative treatment and his final diagnosis was "post traumatic cranial syndrome", laceration of the scalp, severe anxiety reaction and cervical myositis. The plaintiff stopped taking medication two months after his accident, and thereafter had not seen any doctor for any treatment. Since returning to work it is undisputed that the plaintiff worked continuously as a high-lo operator to the date of the trial.

Plaintiff's chief complaint at the time of trial was a limitation of motion in turning his neck from side to side. The duties of a high-lo operator require him to work in small spaces, to look where one is going, to look from right to left and up and down. The plaintiff high-lo operator did not have any rear view mirror.

The plaintiff worked continuously for five years and eight months since his accident as a high-lo operator.

There is no basis in the record and no testimony that the plaintiff has sustained any pain and suffering at the present time for which medication was given.

The record in the present case also verifies that there is no suggestion that the plaintiff will incur any loss of future earnings.

Therefore there is no basis in this record for the charge and the questions given to the jury as to future loss of wages and as to future pain and suffering.

Since these subjective minor injuries sustained by the longshoreman plaintiff have not resulted in any permanent disability from employment it should be concluded that the jury's verdict was excessive from the viewpoint of findings of permanent disability from future employment which is not justified by the testimony and is therefore grossly excessive. This rule should also apply to the jury's findings for future pain and suffering.

The verdict of the jury should be set aside and a new trial granted on the issue of damages.

CONCLUSION

The judgment appealed from which granted indemnity to the defendant Chios against Dole Group was in error and should be ~~refused~~. reversed.

Respectfully submitted,

FOGARTY & WYNNE
Attorneys for Fourth Party
Defendants-Appellants

On the Brief

JOSEPH EDWARD BRADY

Jose Fernandez
Plaintiff
against
Chios Shipping Co. Ltd.,
Defendant and Third Party Plaintiff-Appellee
against
Maher Stevedoring Company Inc., and States Marine Lines Inc.,
Third Party Defendants-Appellants
Chios Shipping Co. Ltd.
Fourth Party Plaintiff-Appellee
against
Castle & Cook Inc., Dole Corp. and Castle & Cook Foods Corporation
Fourth Party Defendants-Appellants
On Appeal fro the United Staes District Court
for the Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Fogarty & Wynee Esqs. being duly sworn, deposes and says that he is over the age of 21 years and resides at Levittown, New York
That on the 15th day of April , 1976
he served the annexed Brief of Fourth Party Defendants-Appellants upon

1. McHugh, Heckman Smith & Leonard
Attorneys for Third Party Defendant-Appellant
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2. Boal, Doti & Larsen Esqs.
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3. Fogarty & Wynne Esqs.
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99 John Street
New York, New York

4. Zock, Petrie, Reid & Curtin Esqs.
Attorney for Third Party Plaintiff-Appellee and Fourth Party Plaintiff-Appellee , Chios Shipping Co. Ltd.
19 Rector Street
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 15th.

day of April, 1978

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified In Delaware County
Commission Expires March 30, 19